

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 73505-s43D BY KEITH R. AND)	
PATTI JO DESHAW)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the September 9, 1991, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 73505-s43D is hereby granted to Keith R. and Patti Jo DeShaw to appropriate surface water at a maximum flow rate of 14 gallons per minute up to 8.85 acre-feet per year from an unnamed tributary of Willow Creek in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14, Township 5 South, Range 20 East, Carbon County, for the purposes of

irrigation and stock watering, all within the said legal land description. The maximum appropriation for each purpose shall be: 14 gallons per minute up to 8 acre-feet per year for irrigation use on 5 acres, and 10 gallons per minute up to 0.85 acre-feet per year for stock use. The means of diversion shall be a dam and onstream reservoir in said legal land description. The capacity of the reservoir shall not exceed 5.6 acre-feet. The period of diversion of water from the source into the reservoir shall be October 1 through May 31. The period of use for stock watering purposes shall be January 1 through December 31 of each year. The period of use for irrigation purposes shall be June 1 through September 30 of each year.

A. The water to be appropriated under this Permit consists of the combined flows from surface water runoff and a developed spring in the natural drainage upon which the dam and reservoir are placed.

B. Permittee must install a release mechanism on the reservoir capable of allowing the release of all water which enters the reservoir during the period from June 1 through September 30 of each year.

C. This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by Permittee to the detriment of any prior appropriator.

D. Issuance of this permit shall not reduce Permittee's


liability for damages caused by exercise of this permit, nor does the Department, in issuing this permit, acknowledge any liability for damages caused by exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

E. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 8 day of October, 1991.



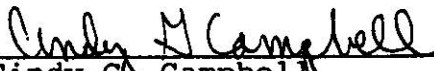
Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 11th day of October, 1991 as follows:

Keith R. DeShaw
Patti Jo DeShaw
HCR Box 1102
Roberts, MT 59070

Keith Kerbel, Manager
Billings Water Resources
Regional Office
1537 Avenue D, Suite 121
Billings, MT 59102


Cindy G. Campbell
Hearings Unit Legal Secretary



BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	PROPOSAL FOR
NO. 73505-s43D BY KEITH R. AND)	DECISION
PATTI JO DESHAW)	

* * * * *

Pursuant to §§ 85-2-121 and 85-2-309, MCA, a hearing was held in the above matter on July 29, 1991, in Red Lodge, Montana, to determine whether the above Application should be granted to Applicants Keith R. and Patti Jo DeShaw under the criteria in § 85-2-311(1), MCA.

Applicants appeared at the hearing on their own behalf. Appearing at the hearing as staff spokesman for the Department of Natural Resources and Conservation ("Department") was Tim Kuehn, Water Resources Specialist with the Department's Billings Water Resources Regional Office.

None of the objectors of record appeared at the hearing. The record shows the Notice of Hearing was served upon all parties on June 7, 1991, by certified mail, return receipt requested. Return receipts were received by the Department, each with the signature of the respective objector. The Notice of Hearing set the hearing for Monday, July 29, 1991, beginning at 9:30 a.m. The Hearing Examiner, Applicants, and Department spokesman were present at the appointed time and place. At 9:50 a.m. the Hearing Examiner opened the hearing on the record. The hearing record was closed at 10:15 a.m. During that time, no

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objector appeared at the hearing. The Hearing Examiner has received no communication from the objectors subsequent to the close of the record.

The Hearing Examiner ruled at the hearing that all objectors were in default and that their objections be stricken. That ruling is hereby confirmed with one modification. The interests of the defaulting objectors in this matter are hereby dismissed and they are hereby dismissed as parties to this proceeding. The forms submitted by the defaulting objectors, which are contained in the Department's file on this matter, shall remain as a part of the record. Mont. Admin. R. 36.12.208 (1984).

No exhibits were offered for acceptance into the record. The Department's file of the above Application was made a part of the record by the Hearing Examiner. No objections to its entry were expressed. The Hearing Examiner takes official notice of the Department's records of water rights in the general vicinity of the proposed appropriation, including the water reservation granted to Carbon Conservation District.

Following the hearing the Hearing Examiner conducted a site visit to the proposed point of diversion and place of use. Also present at the site visit were the Applicants and Tim Kuehn. The purpose of the site visit was to familiarize the Hearing Examiner with the site of the proposed project solely to facilitate his understanding of the evidence on the record. The offering of additional evidence or argument was not allowed, and did not occur.

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit No. 73505-s43D was filed with the Department on May 31, 1990, at 10:00 a.m. (Department's file)

2. The application form stated that Applicants proposed to appropriate surface water at a flow rate of 14 gallons per minute (gpm) up to 8.85 acre-feet (AF) per year from an unnamed tributary of Willow Creek by means of a dam and onstream reservoir in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14, Township 5 South, Range 20 East, Carbon County. The proposed purposes were 10 gpm up to 3 AF per year for domestic use, 14 gpm up to 5 AF per year for irrigation use, and 10 gpm up to 0.85 AF per year for stock use, all within said legal land description. The capacity of the proposed reservoir would be 5.6 AF. The proposed period of diversion of water from the source into the reservoir would be October 1 through May 31 of each year. The proposed period of use for the domestic and stock purposes was January 1 through December 31 of each year. The proposed period of use for irrigation purposes was June 1 through September 30 of each year. (Department's file and testimony of Keith DeShaw)

3. Pertinent portions of the Application were published in the Carbon County News, a newspaper of general circulation in the area of the proposed source, on November 29, 1990. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be

interested in or affected by the application. (Department's file)

4. The Department received objections filed against this Application. (Department's file) The interests of all objectors were subsequently dismissed. See page two above.

5. The proposed point of diversion and place of use are owned by Applicants. (Department's file and testimony of Keith DeShaw)

6. The domestic use identified on the application form would be for lawn and garden purposes only, there would be no use of the proposed appropriation for household purposes such as cooking, bathing, or drinking. The amount of water proposed on the application form for domestic use would all be used for irrigating lawn and garden. This irrigation is in addition to the irrigation identified separately on the application form, but would be within the same general place of use and acreage.

The application was amended at the hearing to eliminate the separate use for domestic purposes and to consolidate the volume amount therein with the volume proposed for irrigation. The stock watering aspect of the proposed appropriation was unchanged. The application as amended proposes to appropriate 14 gpm up to 8 AF of irrigation on 5 acres in the NE~SE~SW~ of Section 14, Township 5 South, Range 20 East, Carbon County, with a period of use of June 1 through September 30 of each year. The amendment more clearly and precisely describes the intended uses

of the proposed appropriation. (Department's file and testimony of Keith DeShaw and Patti Jo DeShaw)

7. The proposed source consists of surface water runoff from snow melt in a narrow dry gully or arroyo and flows from a naturally occurring spring in the wash. With development, the spring will provide enough water to satisfy the proposed appropriation when combined with the present level of surface water runoff. Applicants also intend to plant a row of trees on the edge of the dry gully as a natural snow fence to increase the accumulation of snow in the gully and thereby increase the amount of surface water runoff flowing down the gully during the spring thaw. (Testimony of Keith DeShaw and Patti Jo DeShaw)

8. The natural spring would be developed by construction of a gravel drain field, using one and one-half inch gravel, and perforated pipe. Water will flow down the natural gully from the collection system to the reservoir site, which is a distance of approximately 300 feet. The construction would be by Applicants. Keith DeShaw has experience in the design and construction of drain fields and septic systems, which is similar to the type of system proposed. (Testimony of Keith DeShaw)

9. The dam and reservoir would be designed by Interstate Engineering in Billings. Applicants are also getting design assistance from the Soil Conservation Service in Joliet, Montana. Construction of the dam would be by a professional construction contractor to ensure that the structure could not wash out.

The contour of the gully at the proposed dam site is very radical and narrow. The dam height would not exceed 12 feet, the total amount of earth to be moved would not exceed 30 yards. The dam will include two culverts: one as an overflow device and one as a flow-through device which would allow for release of water during the period between May 31 to October 1, the period of each year which is outside the proposed period of appropriation. The specifics of the overflow and release devices will be determined by the design engineers. (Testimony of Keith DeShaw)

10. Water from the spring does not contribute to the flow of Willow Creek. Runoff water from the gully does not reach Willow Creek. (Department's file and testimony of Keith and Patti Jo DeShaw)

11. No water right on record with the Department identifies the gully or spring as a point of diversion or as a specific source. (Department's water rights records and Department's file)

12. There are no planned uses or developments for which a permit has been issued for water from the proposed source or Willow Creek or Rock Creek, streams down gradient from the proposed appropriation. (Department's water rights records and Department's file)

13. The Board of Natural Resources and Conservation has reserved surface flows of the Clarks Fork of the Yellowstone River (which is down gradient from the proposed appropriation) for the Carbon Conservation District. The reservation has a

priority date of December 15, 1978. (Testimony of Tim Kuehn, Department's file, and Department's water rights records)

The objection form submitted by the Carbon Conservation District states no basis for the objection pertinent to the statutory criteria for issuance of a permit. There is no statement alleging or implying that the proposed appropriation would have an adverse effect on the District's water reservation. (Department's file)

14. The Rock Creek drainage basin, in which the proposed appropriation is located, has been closed to new appropriations of surface water from June 1 through September 30 inclusive of each year. Mont. Admin. R. 36.12.1013 (1990).

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. Title 85, Chapter 2 (1989).

2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Hearing Examiner. See Findings of Fact 1, 2, 3, and 4.

3. The Department must issue a Beneficial Water Use Permit if the applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1), MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. To meet the substantial credible evidence standard in § 85-2-311(1), MCA, the applicant must submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the Department, the U.S. Geological Survey, or the U.S. Soil Conservation Service and other specific field studies, demonstrating that the criteria are met. Mont. Code Ann. § 85-2-311(4) (1989).

5. An Application for Beneficial Water Use Permit may only be amended after public notice of the application if the amendments would not prejudice anyone, party or non-party, i.e., those persons who received notice of the application as originally proposed but did not object would not alter their position due to the amendments. See In re Applications Nos. W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc. To cause prejudice, an

amendment must suggest an increase in the burden on the source beyond that identified in the notification of the application as originally proposed. Such a suggestion of increased burden would be inherent in an amendment to expand the period of diversion, reduce return flows, increase the rate of diversion, increase the volume of water diverted, add an instream impoundment, or other such controlling parameters of the diversion. Conversely, there are many amendments that would not suggest an increase in the burden, such as a reduction in the place of use. See In re Application No. 50272-g42M by Joseph F. Crisafulli.

The amendment made by Applicants at the hearing in this matter does not suggest an increase in the burden on the source, and therefore can be adopted. See Finding of Fact 6.

6. The proposed uses of water, irrigation and stock watering, are beneficial uses. Mont Code Ann. § 85-2-102(2)(a) (1989).

7. Applicant proved by substantial credible evidence that Applicant has possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 5.

8. Applicant proved by substantial credible evidence that unappropriated waters are reasonably available in the source of supply at the proposed point of diversion in the amount and during the period Applicant seeks to appropriate. See Finding of Fact 7 and 8. The source of water is a combination of the surface water runoff in the gully and flows from the developed spring in the gully. To more clearly and precisely identify the

source, the permit must state that the water to be appropriated is from this combination of flows.

9. Applicant proved by substantial credible evidence that the proposed means of diversion, construction, and operation of the diversion works are adequate. See Findings of Fact 8 and 9.

10. Applicant proved by substantial credible evidence that the water rights of prior appropriators will not be adversely affected. See Finding of Fact 10 and 11.

11. Applicant proved by substantial credible evidence that the proposed use will not interfere unreasonably with other planned uses for which a permit has been issued or for which water has been reserved. See Conclusion of Law 10; Findings of Fact 10, 11, 12, and 13.

12. The proposed appropriation will not violate the basin closure that has been imposed by rule and is in effect. Any application for a storage facility to impound water outside the period from July 1 through September 30, and from which water could be subsequently used during any portion of the year, is exempt from these rules. Mont. Admin. R. 36.12.1013(5) (1990); see Finding of Fact 2.

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 73505-s43D is hereby granted to Keith R. and Patti Jo DeShaw to appropriate surface water at a maximum flow rate of 14 gallons per minute up to 8.85 acre-feet per year from an unnamed

tributary of Willow Creek in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14, Township 5 South, Range 20 East, Carbon County, for the purposes of irrigation and stock watering, all within the said legal land description. The maximum appropriation for each purpose shall be: 14 gallons per minute up to 8 acre-feet per year for irrigation use on 5 acres, and 10 gallons per minute up to 0.85 acre-feet per year for stock use. The means of diversion shall be a dam and onstream reservoir in said legal land description. The capacity of the reservoir shall not exceed 5.6 acre-feet. The period of diversion of water from the source into the reservoir shall be October 1 through May 31. The period of use for stock watering purposes shall be January 1 through December 31 of each year. The period of use for irrigation purposes shall be June 1 through September 30 of each year.

A. The water to be appropriated under this Permit consists of the combined flows from surface water runoff and a developed spring in the natural drainage upon which the dam and reservoir are placed.

B. Permittee must install a release mechanism on the reservoir capable of allowing the release of all water which enters the reservoir during the period from June 1 through September 30 of each year.

C. This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize

appropriations by Permittee to the detriment of any prior appropriator.

D. Issuance of this permit shall not reduce Permittee's liability for damages caused by exercise of this permit, nor does the Department, in issuing this permit, acknowledge any liability for damages caused by exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

E. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

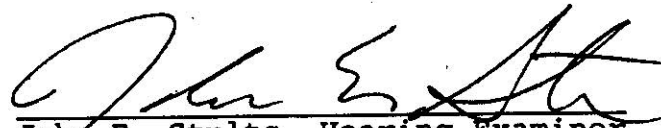
NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The defaulted objectors are restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by the defaulted objectors on other substantive issues.

Any exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 9th day of September, 1991.


John E. Stults, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 10th day of September, 1991, as follows:

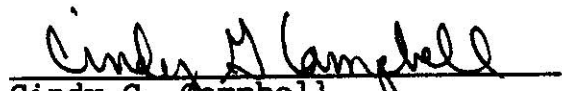
Keith R. DeShaw
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Rock Creek Water Users' Assoc.
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Secretary/Treasurer
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Kathryn M. Mikkola
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